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No. 05-1394

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PATRICIA ANN CAREY,

Petitioner,

v.

AMY OKUBO and WILLIAM WOOD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF

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STATEMENT OF THE CASE

The Respondents' Brief in Opposition to Petition for a Writ of Certiorari contains a statement of facts that begins with the assertion that "Petitioner Patricia Ann Carey is a convicted felon serving concurrent sentences for drug possession and distribution."

The Respondents then proceed to recite a number of times that Ms. Carey allegedly tested positive for cocaine use while she was on bond waiting trial on charges of possession and intent to sell. The Respondents conclude their recitation in their Statement of Facts: "In late August, 2004, Ms. Carey was arrested on federal drug charges. Ms. Carey was later convicted in all three cases and sentenced to prison."

The fact that Ms. Carey is a convicted felon is totally irrelevant to the issues raised in the Petition for Certiorari. Regardless of her subsequent conviction, Ms. Carey had and still has all of her Constitutional rights pursuant to the Fourth and Fourteenth Amendments to the United States Constitution.

The fact that Ms. Carey may have tested positive for cocaine previous to or subsequent to the incident that is the basis for the case and the Petition is also completely irrelevant to the issues raised in the Petition.[1]

The only rationale for the Statement of the Case presented by Respondent is to paint Ms. Carey in the worst

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1. The GCMS test that Respondents allege confirmed Ms. Carey's use of cocaine on June 30, 2004, while above the laboratory cutoff, was determined by Respondents' own toxicologist to be far below the amounts that would have indicated the user would have felt any pharmacological effect and were within the range for the absorption through the skin of minute amounts spilled in the environment.

light possible before this Court; and not so subtly to suggest to this Court that she is not entitled to the protections to be free of unreasonable seizure of her person pursuant to the Fourth and Fourteenth Amendments. Ms. Carey's drug use or convictions have no bearing on whether the Respondents had the right to issue an arrest affidavit that knowingly omitted facts that were exculpatory to Ms. Carey.

REASONS THE PETITION SHOULD BE GRANTED

While the Tenth Circuit analyzed the issue of Respondents' absolute immunity it failed to apply its own decision in *Stewart v. Donges*, 915 F.2d 572, 582 (10th Cir. 1990). In *Stewart* the Tenth Circuit stated that situations where a prosecutor "knowingly or recklessly omits from an arrest affidavit information, which, if included, would have vitiated probable cause" were subject to the exception to absolute immunity as determined by this Court in *Kalina v. Fletcher*, 522 U.S. 118 (1997).

The Tenth Circuit in analyzing the facts in this case found that the Respondents were entitled to absolute immunity in performing their prosecutorial functions because they were not vouching for the scientific reliability of the test procedure used to determine that Ms. Carey had used cocaine on or about June 22, 2004.

What the Tenth Circuit failed to include in its analysis is the fact that the toxicologist who performed the EIA test specifically informed the Respondents that the EIA was not reliable and could not be used for evidentiary purposes. Thus the arrest affidavit was based on information that Respondents knew was not to be used as evidence of the alleged bond violation. This information, if it had been included in the arrest affidavit "would have vitiated probable cause."

Respondents' arguments all ignore the material fact that they **knew** at the time that they filed the noncompliance report and arrest affidavit that their own toxicologist had determined the EIA test was not **evidence** of cocaine use. Even if the EIA test is accepted as evidence in other jurisdictions, Respondents were in possession of information that the EIA test was not sufficiently reliable to be used as evidence in Ms. Carey's case.[2]

Respondents' citation to *Easter v. Saffle*, 51 Fed. Appx. 286, 2002 WL 3152867 (10th Cir. 2002) and *Koening v. Vannelli*, 971 F.2d 422 (9th Cir 1992) are inapposite to the issues presented in this case because both of them involve the substantive and procedural due process rights of prisoners in disciplinary actions.

This Court has held that prisoners do not have all of the due process rights that are available to defendants in criminal cases:

> Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a "retraction justified by the considerations underlying our penal system." *Price v. Johnston, 334 U.S. 266, 285 (1948)* . . .
>
> Viewed in this light it is immediately apparent that one cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison.

Wolff, Warden, et al. v. McDonnell, 418 U.S. 359, 555, 560, 94 S. Ct. 2963, 41 L. Ed. 935 (1974).

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2. Respondents' Opposition Brief refers to the Enzyme Immuno-assay test "EIA" when referring to the test on which the arrest affidavit was based and "EMIT" tests when referring to the acceptance of the tests as evidence. It is not clear that the two tests are the same or equivalent.

Thus it is possible for a single urinalysis to be sufficient to satisfy the due process rights of a prisoner in a disciplinary hearing because the standard is only "some evidence" not the preponderance of evidence or evidence beyond a reasonable doubt applied in criminal procedures.

In addition, the *Easter* case is an unpublished opinion of the Tenth Circuit. Pursuant to 10th Cir. R. 36.3 an unpublished opinion may be cited only under limited circumstances:

Cir. R. 36.3. Citation of unpublished opinions/orders and judgments

> (A) Not precedent. Unpublished orders and judgments of this court are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel.
>
> (B) Reference. Citation of an unpublished decision is disfavored. But an unpublished decision may be cited if
>
> (1) it has persuasive value with respect to a material issue that has not been addressed in a published opinion; and
>
> (2) it would assist the court in its disposition.
>
> (C) Attach copy. A copy of an unpublished decision must be attached to any document that cites it. If an unpublished decision is cited at oral argument, the citing party must provide a copy to the court and the other parties.

Respondents have not shown that they have met the requirements of 10th Cir. R. 36.3 for citation of the unpublished opinion of *Easter.*

Respondents' citation to *People v. Nolan*, 95 Cal. App. 4th 1210 (2002) and *Jones v. United States*, 548 A.2d 35 (D.C. Ct. App. 1998) is an attempt to mislead this Court with respect to the issues in this case. Even if it were true that immunoassay tests were accepted in every other court in the nation, in this case Respondents were specifically informed by the toxicologist that the tests were not reliable and should not be used as evidence in any criminal matter. Respondents deliberately failed to provide this information to the court issuing the arrest warrant.

CONCLUSION

Petitioner respectfully incorporates the facts and authorities as set for in her Petition for a Writ of Certiorari herein and submits that in light of the facts of this case this Court should grant the petition.

Respectfully submitted,

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